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The Clean Water Act, Water Quality, and Water Use

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Citation Information

Ray, Bruce D., "The Clean Water Act, Water Quality, and Water Use" (1987). *Water as a Public Resource: Emerging Rights and Obligations (Summer Conference, June 1-3)*.
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THE CLEAN WATER ACT, WATER QUALITY, AND WATER USE

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WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS

A Short Course Sponsored by the
Natural Resources Law Center
University of Colorado
School of Law

June 1-3, 1987

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WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS

"The Clean Water Act, Water Quality, and Water Use"

By Bruce D. Ray*,
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I. Goals and Objectives of the Clean Water Act

- A. Sec. 101(a): principal objective is to preserve and maintain the physical, chemical, and biological integrity of the nation's waters.
- B. Sec. 101(a)(1): to achieve this objective it is a national goal to ultimately eliminate all pollutant discharges.
- C. Sec. 101(a)(2): it is a national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.
- C. Congress has adopted a broad ecological approach to protecting nation's waters.

II. Restrictions on discharge

- A. Sec. 301 (in conjunction with the definitions in Sec. 502) is the principal regulatory provision which prohibits the discharge of pollutants from point sources to waters of the U.S. without a permit.
- B. Two types of Clean Water Act permits
 - 1. Sec. 402 NPDES permits
 - a. NPDES permits cover waste type discharges of pollutants
 - i. non-waste discharges are regulated by the Sec. 404 program
 - ii. EPA and the Corps executed a MOA on Jan. 17 1986 to assist the agencies determine whether any given discharge is regulated under Sec. 402 or Sec. 404
 - b. NPDES permits are issued by EPA or states
 - c. NPDES permits contain effluent limitations on certain chemical parameters which are:
 - i. technology-based as derived from the EPA-promulgated effluent guidelines or BPJ
 - ii. based on water quality standards promulgated by states or EPA in the form of individual numeric criteria, narrative criteria, and antidegradation requirements
 - iii. any more stringent requirement established by state law
 - 2. Sec. 404 dredge and fill permits
 - a. Sec. 404 permits generally cover non-waste discharges of dredged or fill material.
 - i. waste discharges are regulated by the Sec. 402 program
 - ii. EPA and the Corps executed a MOA on Jan. 17 1986 to assist the agencies determine whether any given discharge is regulated under Sec. 402 or Sec. 404
 - b. Sec. 404 permits are issued by the Corps of Engineers (or states) in consultation with two resource agencies: EPA and FWS
 - c. Sec. 404 permits are issued according to guidelines promulgated by EPA (40 CFR Part 230) which contain, inter alia, restrictions on discharge.

*The views expressed herein are solely those of the author. No support or endorsement of the United States Environmental Protection Agency or any other federal agency is implied or should be inferred.

III. Role of States

- A. Sec. 401 certification
 - 1. States must certify that construction and operation of any facility or activity which requires a federal license or permit does not violate any state water quality standard (WQS).
 - 2. Sec. 401 is a state program in the first instance without delegation.
 - 3. Where a state cannot implement Sec. 401 (because of lack of statutory or regulatory authority (e.g. South Dakota), EPA must do the 401 certification. Sec. 401(a)(1), 40 CFR 121.21.
- B. Water Quality Standards
 - 1. Sec. 303 makes WQS a state program in the first instance, i.e. states promulgate WQS and EPA reviews and approves or disapproves/promulgates.
 - 2. WQS must protect the public health and welfare, enhance the quality of water, and serve the purposes of the Clean Water Act. Further, WQS must be established taking into account their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, etc. Sec. 303(c)(2), 40 CFR 131.2.
 - 3. Principal features of the WQS program
 - a. WQS for individual stream segments, including
 - i. uses, Sec. 303(c)(2), 40 CFR 131.10 (generally uses must be "fishable and swimmable" uses)
 - ii. criteria to protect the uses (numeric or narrative), 40 CFR 131.11
 - b. Antidegradation policy (regulation), 40 CFR 131.12
 - c. implementation
 - i. TMDL /WLA process, Sec. 303(d), 40 CFR Part 130
 - ii. Continuing planning process, Sec. 303(e), 40 CFR Part 130
- C. Delegation of permit programs
 - 1. Sec. 402 NPDES (38 delegated states)
 - 2. Sec. 404 Dredge and Fill (Michigan is the only delegated state)
 - 3. When the permit programs are delegated, EPA retains oversight authority to review state-issued permits
- D. Sec. 510 preservation of state authority
 - 1. Sec. 510 preserves to the states certain authorities related to pollution control and water allocation.
 - 2. Specifically, under Sec. 510 the CWA is not:
 - a. to preclude states from adopting and enforcing any standard, limitation, or requirement respecting pollutant discharges, control or abatement; (i.e. more stringent requirements) and,
 - b. to be construed as impairing or affecting any state's right or jurisdiction with respect to waters of such state (including water allocation, see Sec. 101(g))

IV. Clean Water Act Sec. 404

A. Overview of Sec. 404

1. Purpose of Sec. 404

- a. protection of wetlands and other special aquatic sites (SAS)
i.e. areas possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. 40 CFR 230.3(q-1). All wetlands are SAS and SAS also include sanctuaries, mud flats, vegetated shallows, coral reefs, and pool and riffle complexes. 40 CFR Part 230, subpart E.
- b. importance and functions of wetlands
 - i. habitat for waterfowl, small mammals, and reptiles
 - ii. water quality: wetlands act as sediment traps and can actually filter some pollutants such as metals
 - iii. flood control
 - iv. recreation and aesthetic values

2. Role of the Corps of Engineers

- a. administration of the Sec. 404 Dredge and Fill permit program
- b. enforcement of Corps-issued permits under Sec. 404(s)

3. Role of the resource agencies

- a. Fish and Wildlife Service
 - i. FWS provides biological expertise in a consultative role under the Fish and Wildlife Coordination Act
 - ii. Sec. 404(q) elevation if FWS disagrees with the Corps on a permit decision
- b. EPA has a more substantive role
 - i. general environmental expertise and expertise in specialty areas such as water quality and waste
 - ii. other substantive authorities (see below)

4. Role of the states

- a. Sec. 401 certification (see V. below)
- b. promulgation of water quality standards including antidegradation

B. Role of EPA

1. Promulgation and policing the Sec. 404(b)(1) Guidelines

- a. Sec. 404(b)(1): "Subject to subsection (c) of this section, each disposal site shall be specified for each such permit by the [Corps] through the application of guidelines developed by [EPA] in conjunction with the [Corps] . . ."
- b. Sec. 404(b)(1) Guidelines at 40 CFR Part 230
 - i. the "Guidelines" are mandatory in nature. See preamble to the Guidelines at 45 Fed. Reg. 85336 (Dec. 24 1980) and revised Corps regulations at 33 CFR 323.6, 51 Fed. Reg. 41206, 41235 (Nov. 13, 1986).
 - ii. principal features (discussed in detail below)
 - substantive criteria for permits - factual determinations
 - restrictions on discharge, i.e. situations where a discharge and hence a permit are prohibited.

2. Sec. 404(c) veto

- a. purpose: to ensure that there will be no unacceptable adverse impacts
- b. operation: Sec. 404(c) can be used before any permit application but in practice it has been used as a veto of Corps permits

3. Sec. 404(q) elevation
 - a. if EPA disagrees with any Corps permit decision, EPA can seek to elevate the matter to higher levels in both agencies to seek resolution.
 - b. the Corps and EPA executed a MOA on 404(q) on Nov. 12, 1985 which controls the procedures to be followed.
4. Determining jurisdiction
 - a. under the 1979 Attorney General's Opinion (Civiletti) EPA is the final administrative arbiter of CWA jurisdiction generally and of Sec. 404 jurisdiction in particular.
 - b. this exclusive authority also extends to the application of the Sec. 404(f) statutory exemptions.
5. Enforcement
 - a. Secs. 301, 309, and 404(n) confer on EPA the authority to enforce against all unpermitted discharges and violations of all Sec. 404 permits.
 - b. the 1976 Legro Opinion affirms this but places EPA enforcement emphasis on unpermitted discharges.
- C. Sec. 404(b)(1) Guidelines
 1. Generally
 - a. the Guidelines are mandatory in nature (see above)
 - b. relationship to Sec. 403 ocean discharge criteria
 - i. Sec. 404(b)(1) directed EPA to establish guidelines for Sec. 404 comparable to the Sec. 403 ocean discharge guidelines
 - ii. Sec. 403 requires EPA to look beyond narrow water quality effects and to consider broad ecological impacts including:
 - effects on human health and welfare
 - effects on aquatic life
 - transfer of pollutants through the ecosystem by biological physical, and chemical processes
 - changes in ecosystem diversity, productivity, and stability
 - effects on species and community population changes
 - effects on aesthetic, recreational, and economic values
 - iii. economic considerations
 - reference to consideration of economic values in Sec. 403(c)(1)(F) makes economics part of the Sec. 404(b)(1) decision. See 45 Fed. Reg. 85343, 51 Fed. Reg. 41207-41208 and 33 CFR 320.4(q).
 - both beneficial and adverse economic factors should be considered
 - however, beneficial economic considerations should not be used in the (b)(1) context to outweigh environmental considerations else there would be no need for the Sec. 404 (b)(2) exception.
 2. Restrictions on discharge 40 CFR 230.10

The restrictions on discharge are often referred to as the substantive heart of the Guidelines since here are specified certain situations when a discharge and hence a permit are prohibited. There are four major restrictions set forth in 40 CFR 230.10: alternatives, specific prohibitions, general prohibition, and mitigation.

- a. 230.10(a) alternatives: no discharge shall be allowed if there is a practicable alternative to the proposed discharge which would have less adverse impacts on the aquatic ecosystem
 - i. practicable alternatives include, but are not limited to:
 - activities without discharge
 - discharges at other locations in waters of the U.S.
 - ii. an alternative is practicable if it is available (i.e. available generally not just available to the permit applicant and available at relevant times before the permit application and decision) and capable of being done after taking into consideration cost, technology, and logistics in light of overall, i.e. fundamental, project purposes. 40 CFR 230.3(q).
 - iii. if it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered. 40 CFR 230.10(a)(3).
 - iv. there are two presumptions in 230.10(a)(3) which may make it much more difficult for the applicant to demonstrate (b)(1) compliance where a discharge to a SAS is proposed:
 - for non-water dependent activities (i.e. where the activity proposed for the SAS does not require access or proximity to or siting within the SAS in order to fulfill its basic purpose) practicable alternatives that do not involve SAS are presumed to be available, and
 - all practicable alternatives to the proposed discharge which do not involve a discharge into a SAS are presumed to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise.
- b. 230.10(b) specific prohibitions: no discharge shall be permitted if the discharge
 - i. causes or contributes to the violation on any applicable water quality standard (including antidegradation),
 - ii. violates any applicable toxic effluent standard,
 - iii. jeopardizes any threatened or endangered species or critical habitat, or
 - iv. violates any DOC requirement for marine sanctuaries
- c. 230.10(c) general prohibition: no discharge shall be permitted if it will cause or contribute to significant degradation of waters of the U.S.
 - i. special emphasis is given to the persistence and permanence of impacts
 - ii. effects contributing to significant degradation are considered individually and collectively and include:
 - effects on human health
 - effects on life stages of aquatic life and wildlife including the transfer, concentration, and spread of pollutants outside of the disposal site
 - effects on aquatic ecosystem diversity, productivity, and stability
 - effects on recreational, aesthetic, and economic values

- d. 230.10(d) mitigation: no discharge shall be permitted unless appropriate and practical steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.
 - i. EPA Nov. 1985 Mitigation Guidance was draft only but many of its principles were and are followed by EPA and its regional offices. A joint Corps/EPA/FWS mitigation policy is under development and should be available by summer of 1987.
 - ii. both EPA and the Corps look to The CEQ NEPA regulations at 40 CFR 1508.20(a) - (e) for the proper definition of mitigation in the Sec. 404 context; however, EPA considers the definition's specific elements to be the proper sequence of steps in the mitigation planning process.
 - thus, a permit's mitigation approach should adhere to the following sequence of steps: (A) impact avoidance, (B) impact minimization, (C) on-site compensation, (D) off-site compensation.
 - the highest level of mitigation appropriate and practicable should be achieved at a given step prior to applying the techniques in subsequent steps.
 - this means a satisfactory alternatives analysis is key and must be conducted regardless of any proposed mitigation plan.
 - iii. where on site losses are unavoidable, mitigation should be in terms of functional equivalency:
 - this generally entails acre for acre and function for function
 - yet less than acre for acre may be acceptable where there are quality considerations.
 - iv. EPA will consider FWS resource category designations and goals and support these concepts to the extent they are consistent with the Guidelines.
 - v. EPA will recommend that all mitigation requirements be incorporated into Sec. 404 permits as implementable and enforceable permit conditions. There must also be compliance monitoring to ensure mitigation is carried out.
 - vi. preservation of non-affected wetlands is generally not considered adequate mitigation.
- 3. Factual determinations 40 CFR 230.11
 - a. the permitting authority must make eight factual determinations for the proposed discharge related to:
 - i. physical substrate
 - ii. water circulation, fluctuation, and salinity
 - iii. suspended particulate/turbidity
 - iv. contaminants
 - v. the aquatic ecosystem and organisms
 - vi. the physical factors of the proposed disposal site and the proposed discharge activity
 - vii. cumulative effects on the aquatic ecosystem
 - viii. secondary effects on the aquatic ecosystem

- b. 40 CFR 230.11 - these factual determinations are then used in 40 CFR 230.12 in making findings on compliance or noncompliance with the restrictions in 40 CFR 230.10
 - c. 40 CFR 230.12 - the result of the factual determinations and the discharge restrictions is a decision by the permitting authority that the discharge is:
 - i. specified as complying with the Guidelines,
 - ii. specified as complying with the Guidelines with adequate mitigation, or
 - iii. specified as not complying because
 - there is a practicable alternative,
 - the discharge will result in significant degradation of the aquatic ecosystem,
 - the proposed discharge does not include all appropriate and practicable mitigation, or
 - there is insufficient information to make a compliance determination.
4. Policing compliance with the Guidelines
- a. burden of proof: the burden of proof to demonstrate compliance with the Guidelines remains at all time on the applicant. The applicant must often rebut the two presumptions in 230.10 (a)(3) which essentially establish prima facie noncompliance.
 - b. Sec. 404(g) elevation (see above)
 - c. Sec. 404(c) veto
 - i. EPA is authorized to prohibit or otherwise restrict a site whenever it determines that the discharge is having or will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.
 - ii. the Sec. 404(c) regulations are set forth at 40 CFR Part 231 and such actions generally adhere to the following procedure:
 - initiation of action by the regional office
 - Regional Administrator's proposed determination
 - Regional Administrator's recommendation to the Administrator
 - Administrator's final determination to affirm, modify, or rescind the recommended determination after consultation with the Corps
 - iii. the opinion in Newport Galleria Group v. Deland, 618 F. Supp. 1179 (D. D.C. 1985), ratified EPA interpretation that Sec. 404(c) may be used to "second guess" the Corps' decisions regarding compliance with the Guidelines.
- D. Jurisdiction
- 1. EPA is the final administrative arbiter of CWA jurisdiction in general and of Sec. 404 jurisdiction in particular (see above)
 - 2. Sec. 404 jurisdiction: there is CWA jurisdiction in the Sec. 404 context when the prohibition in Sec. 301 obtains, viz., when there is a discharge of pollutants from a point source to waters of the U.S.
 - a. the definitions of these terms are set forth in CWA Sec. 502, 40 CFR 122.2, 40 CFR 230.3, and 33 CFR 321.2. Court opinions

generally effect the congressional intent to liberally interpret these definitions.

- b. There still remains some controversy over which wetlands are waters of the U.S.
3. Waters of the U.S.
 - a. there are two principal characteristics which qualify wetlands as waters of the U.S.
 - i. the requisite physical characteristics, i.e. the area in question must be inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.
 - ii. a nexus to interstate commerce.
 - b. adjacent wetlands
 - i. wetlands which are bordering, contiguous, or neighboring other waters of the U.S. are themselves waters of the U.S. This would also apply to wetlands which are tributary to other waters of the U.S.
 - ii. Such adjacent wetlands were the subject of the recent Riverside Bayview Homes opinion, 106 S.Ct. 455 (1985)
 - c. isolated wetlands are essentially nonadjacent wetlands such as prairie potholes.
 - i. these wetlands must have an independent nexus to interstate commerce.
 - ii. most isolated wetlands are within CWA jurisdiction since it was the intent of Congress to reach as many waters as permissible under the Commerce Clause of the U.S. Constitution. See, e.g., Quivera Mining Company v. U.S., 765 F.2d 126 (10th Cir. 1985).
 - iii. the September 1985 Opinion of the EPA General Counsel determined that jurisdiction obtains over isolated wetlands if they are or could be used by migratory waterfowl or interstate travelers. See, e.g., State of Utah v. Marsh, 740 F.2d 799 (10th Cir. 1983)
 - d. artificial wetlands: if artificial wetlands feature the requisite physical characteristics and have a nexus to interstate commerce, CWA jurisdiction obtains, i.e. there is no blanket exemption for artificial waters. See 51 Fed. Reg. 41217, 33 CFR 328.3, 328.4, 328.5, and 328.6. See U.S. v Akers, 25 ERC 1609, 1611 (E.D. Cal. 1987).
- E. Differences between Sec. 402 and Sec. 404
 1. for Sec. 402, WQS are implemented through an advance planning effort in TMDLs and WLAs. Sec. 303(d) and 40 CFR Part 130.
 - a. effluent limits are then derived from the WLAs for all parameters of concern.
 - b. Sec. 301(b)(1)(B) requires that no Sec. 402 permit issued unless WQS and other state requirements will not be violated
 2. for Sec. 404 there is really no comprehensive advanced planning effort (but see Sec. 404(c)) since most discharges are one time events; rather, compliance determinations are more ad hoc

Any state or federal WQS established under Sec. 303 is integrated into the Sec. 404 permit by the Sec. 404(b)(1) Guidelines.

- a. similar to Sec. 301(b)(1)(C), 40 CFR 230.10 ensures that no Sec. 404 permit will be issued if the discharge will cause or contribute to the violation of any WQS.
- b. 40 CFR 230.10 reinforces this specific provision by prohibiting a Sec. 404 permit if the discharge will cause or contribute to "significant degradation"
 - i. sig. deg. includes both narrow WQS considerations and broader ecological considerations
 - ii. sig. deg. could arguably occur in the narrow WQ sense even in the absence of WQS violations.

V. Clean Water Act Sec. 401 Certification

A. Statutory and Regulatory Requirements

1. Sec. 401(a)(1) general rule: an applicant for a federal permit to conduct any activity (including, but not limited to, the construction or operation of any facilities which may result in a discharge) must provide the federal permitting agency a state certification that any such discharge will comply with, inter alia, Sec. 303 WQS and implementation plans.
 - a. Where there is no appropriate state requirement the state must so certify.
 - b. Where the state has no authority to certify EPA must certify.
 - c. The state can waive certification.
 - d. No federal permit can be issued until certification or waiver.
 - e. No federal permit can be issued if the state or EPA has denied certification.
 - f. Upon receipt of the application and certification, the federal permitting agency must immediately notify EPA (Sec. 401(a)(2)).
2. Sec. 401(a)(2): interstate situations generally.
3. Sec. 401(a)(3) operating permit: generally where separate federal operating permit needed, certification for construction is sufficient.
 - a. general rule obtains unless state or EPA notifies federal agency issuing operating permit that there is no longer reasonable assurance of compliance with, inter alia, WQS because of changes since construction certification was issued related to:
 1. Facility construction or operation.
 2. Characteristics of receiving waters.
 3. WQS of receiving waters.
 4. Applicable effluent limits or other requirements.
 - b. general rule does not apply if applicant has failed to notify state or EPA of changes in facility construction or operation (for which a construction permit was granted), which changes result in violations of, inter alia, WQS.
4. Sec. 401(a)(4) where operating permit not required: permittee must provide certifying agency opportunity to review the manner in which the facility or activity will be operated for

purposes of assuring compliance with:

- effluent limits
- other limitations
- other applicable water quality requirements
- a. Upon notification by certifying agency to permitting agency that operation of the facility or activity will be in violation, the permitting agency may, after public hearing, suspend the permit.
- b. Such suspension remains in effect until the certifying agency gives notice that there is reasonable assurance of compliance with, inter alia, WQS.
- 5. Sec. 401(a)(5) revocation: federal permit may be revoked by permitting agency upon entering of judgment in a Clean Water Act action that the facility or activity has been operated in violation of, inter alia, WQS.
- 6. Sec. 401(a)(6): limited grandfathering where facility construction commenced prior to April 3, 1970.
- 7. Sec. 401(b) general rule: Sec. 401 does not limit the authority of any department or agency under any other provision of law to require compliance with any applicable water quality requirement.
 - a. Upon request of any federal or state agency or the applicant, EPA must provide (for purposes of Sec. 401) relevant information on applicable:
 - i. effluent limits
 - ii. other limitations, standards and regulations or requirements
 - iii. water quality criteria
 - b. Upon request of any federal or state agency or the applicant EPA must comment on any methods to comply with such limits, standards, regulations, requirements, or criteria.
- 8. Sec. 401(d) limitations and monitoring requirements: any 401 certification must set forth any effluent or other limitation and monitoring requirements necessary to assure that the permit applicant will comply with, inter alia, any limitation under Sec. 301 and any other appropriate requirement of state law set forth in the certification.
 - any such limitation or requirement must be made a condition of the federal permit
- B. Legislative History
 - 1. Sec. 401 is based on Sec. 21(b) of the Water Quality Improvement Act of 1970 (PL 91-224, 84 Stat. 91)
 - 2. the overall purpose of Sec. 401 is to ensure that federal permitting agencies do not override state water quality requirements. 2 Legis. Hist. 1487 (remarks of Sen. Muskie); 1 Legis. Hist. 176; III EPA Legal Comp. Water 1536 (1970 Conf. Rep.).
 - 3. in 1977 Sec. 401 was amended to include explicit reference to Sec. 303 (WQS). Also the 1977 conference report uses language from the 1970 act indicating that no significant changes were made by the 1972 language. 3 Legis. Hist. 280.
 - 4. certification for construction contemplates consideration of whether facility or activity operation will comply with WQS. Debate on the 1970 predecessor of Sec. 401(a)(3) shows that this subsection was

intended to ensure sufficient early planning through, e.g., changes in facility site or design to avoid WQS violations during operation. IV EPA Legal Comp. Water 1201, 1765. (This is much the same purpose as 40 CFR 230.10(a))

VI. Antidegradation

A. Basic purposes generally

1. to protect high quality waters from unnecessary degradation
2. to ensure that water quality improvements made over the years are maintained

B. History

1. policy originally established by then Secretary of the Interior Udall in February 1968
2. 1968 Hearings on the policy held by Senate and House public works committees
3. Included in the Guidelines for Developing and Revising Water Quality Standards (January 1973)
4. Regulatory provision included in the first water quality standards regulation (November 1975)
5. Guidance re-issued in Guidelines for State and Areawide Water Quality Management Program Development, Chapter 5 (November 1976)
6. Proposal to drop most of the previous regulatory language, particularly Tiers II and III (October 1982)
7. Letter from Senate Subcommittee on Environment and Public works to the Acting Administrator critical of the October 1982 proposal (March 14, 1983)
8. Letter from the Administrator to Chairman, Senate Subcommittee on Environment and Public Works (Oct. 28, 1983)
9. Three tiered regulatory provision retained in final standards regulation (November 1983)

C. Basic requirements

1. Federal regulations require states:
 - a. adopt a statewide antidegradation policy (i.e. regulation) 40 C.F.R. 131.12(a).
 - b. identify methods for implementing the policy. 40 C.F.R. 131.12(a).
2. The state policy and implementation methods must, at a minimum, be consistent with the three tier system established by federal regulations.
 - a. Tier I existing uses: both existing in stream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
 - b. Tier II high quality waters: where water quality is better than "fishable/swimable" (i.e. better than the Sec. 101(a)(2) interim goal) said water quality must be maintained.
 - i. Exception: water quality may be degraded to the level where the existing uses are just fully maintained if the state finds, (after full satisfaction of the intergovernmental coordination and public participation requirements in the CPP) that the degradation is necessary to accommodate important economic and social

development in the area in which the waters are located.

ii. In addition, the state must assure that there is achieved:

- (A) The highest statutory and regulatory requirements for all new and existing point sources; and
- (B) All cost-effective and reasonable BMPs for nonpoint source control

c. Tier III Outstanding National Resource Waters: water quality shall be maintained and protected.

i. ONRW include waters of national parks, state parks, wildlife refuges.

ii. ONRW generally include waters of exceptional recreational and ecological significance.

D. Water Quality Act of 1987 (1987 CWA Amendments)

1. WQA Sec. 404 Antibacksliding

a. New CWA Sec. 402(O) establishes a general antibacksliding rule for both BPJ - and WQS-based effluent limits.

b. Exceptions to antibacksliding for WQS-based effluent limits are set forth in new Sec. 303(d)(4).

i. Where the WQS is not being attained, backsliding allowed only where cumulative effect of all effluent limit revisions will assure WQS attainment or designated (non-existing) use is removed according to 40 C.F.R. 131.10(g).

ii. Where the WQS is being attained, backsliding is allowed only if such is consistent with "the antidegradation policy established under this section [i.e. Sec. 303]."

2. Wasteload allocations cannot be revised except where the cumulative effect results in a decrease in the amount of pollutants discharged and the revisions are not the result of a discharger eliminating or reducing discharges due to CWA requirements or reasons otherwise unrelated to water quality.

3. EPA interprets actual use of word in text of statute constitutes direct congressional recognition of EPA's antidegradation requirements.

VII. Clean Water Act Sec. 101(g)

A. Three Congressional Policies in Sec. 101(g)

1. Authority of each state to allocate quantites of water within its jurisdiction is not superseded, abrogated or impaired by the CWA

2. The CWA is not to be construed to supersede or abrogate state-established water rights

3. Federal agencies are to cooperate with states to develop comprehensive pollution control programs in concert with programs for managing water resources.

B. Legislative history

1. Provision was co-sponsored by Senators Wallop and Hart as part of the 1977 amendments
2. Sec. 101(g) was intended to clarify existing law and assure effective implementation of existing law, i.e., Sec. 510(2), not to change existing law. H. Rept. 95-830, Dec. 6, 1977, p. 52 (Conference Report)
3. The only other legis. hist. for Sec. 101(g) outside of the Conference Report comes from floor debates in the Senate at 123 Cong. Rec. S19677-78 (Dec. 15, 1977) (Remarks of Sen. Wallop).
 - a. Sec. 101(g), ". . . reaffirms that it is the policy of congress that this [Clean Water] act is to be used for water quality purposes only."
 - b. "Legimate water quality measures authorized by this act may at times have some effect on the method of water usage."
 - c. "It is not the purpose of this amendment to prohibit those incidental effects."
 - d. Rather the purpose of Sec. 101(g) is to insure that ". . . effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations."

C. Effect of Sec. 101(g)

1. Sec. 101(g) reinforces the general proscription in Sec. 510(2) against unnecessary interference with state water rights.
2. Congress did not intend to prohibit EPA from taking any authorized measure necessary to protect water quality.
 - a. Congress did not change the strict requirement in Sec. 301(b)(1)(C) that all point sources must meet WQS
 - b. Congress did not change the goals of the CWA concerning eventual elimination of all discharges, maintaining the physical, chemical and biological integrity of the nations waters, and protection of "fishable/swimmable" uses
3. The requirements of WQS (including antidegradation), Sec. 402 and 404 permits, and Sec. 208 and other regional and local plans may incidentally affect water rights and usages without running afoul of Sec. 101(g) and 510(2)

D. Recent cases

1. Riverside Irrigation District v. Andrews, 758 F. 2d 508 (10th Cir. 1985).
 - a. Where both state's interest in water rights and U.S. interest in environmental protection are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process. 758 F. 2d at 513.
 - b. Congress did not want to interfere any more than necessary with state water management. *Id.*, citing NWF v. Gorsuch, 693 F. 2d 156, 178 (D.C. Cir. 1982).

2. U.S. v. Akers : CWA enforcement action for unpermitted discharges to a wetland in the form of a dike. Defenses related to Secs. 101(g) and 404(f).
 - a. 22 ERC 1238 (E.D. Cal. 1985)
 - i. argument that Sec. 101(g) exempts activities related to the exercise of state water rights is meritless since CWA does not itself impermissibly violate state water rights. 22 ERC at 1246.
 - ii. any argument that state water rights somehow prevent U.S. from asserting jurisdiction within its constitutional limit is obviously groundless. Id.
 - iii. Sec. 101(g) does not provide an automatic exemption. Id.
 - b. affd. 785 F. 2d 814 (9th Cir. 1986)
 - i. District court did not construct Sec. 101(g) or Sec. 404(f) too narrowly so as to render Defendant's water rights arguments "virtually meaningless." 785 F. 2d at 821.
 - ii. any incidental effect on Defendant's water rights is justified because protection of wetlands is the type of legitimate purpose for which the CWA was intended.
3. U.S. v. Ciampitti, 583 F. Supp. 483 (D. N.J. 1984), affd. mem., 772 F. 2d 893 (3rd Cir. 1985), cert. den. 106 S. Ct. 1192 (1986). CWA enforcement action for unpermitted discharge to man-induced (artificial) wetland. Defendants argued a state riparian grant, which allowed them to do anything to the land under state law, exempts them from CWA regulation. The court disagreed.
 - a. Defendants were "... either laboring under a serious misapprehension or disregarding very basic tenets of the United States Constitution." 583 F. Supp. at 496.
 - b. "So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action . . . flow[s] directly from the substantive source of the congressional action coupled with the supremacy clause . . ." Id. quoting Tribe.

VIII. Enforcement of Clean Water Act Restrictions on Discharge

A. Generally

1. Federal enforcement can be administrative, civil judicial and criminal
2. State enforcement is generally similar to federal enforcement
3. Citizen enforcement is specifically provided for in the Clean Water Act

B. Federal Administrative Enforcement

1. Sec. 309 compliance orders
 - a. Sec. 309(a)(1) notice of violation. If EPA discovers a violation in a delegated state, it can issue a notice of violation to the state and the violator. If the state does not take an enforcement action within 30 days, EPA must then either issue a compliance order or bring a civil action.

- b. Sec. 309(a)(3). If EPA discovers a violation it may issue a "compliance only" order requiring the violator to take steps to come into compliance.
- 2. Sec. 309(g) administrative penalty orders
 - a. Sec. 309(g) establishing administrative penalty authority for EPA and the Corps is the first major change in the CWA enforcement program since 1972
 - b. Sec. 309(g) creates a two class system for assessing administrative penalties.
 - i. Class I
 - amount: Class I penalties may be assessed at \$10,000 per violation up to a maximum penalty of \$25,000.
 - procedure: Class I penalty actions are informal, non-APA type actions which will feature notice and opportunity to be heard, some cross-examination, and a neutral decision maker.
 - ii. Class II
 - amount: Class II penalties may be assessed at \$10,000 per day for each day during which the violation continues up to a maximum of \$125,000.
 - procedure: Class II actions are formal APA type actions which will likely follow the procedures in existing regulations at 40 CFR Part 22.
 - iii. Public involvement: Sec. 309(g) provides for substantial public involvement at both the proposed and final penalty order stages.
 - iv. Determining penalty amount: Sec. 309(g) sets forth six factors which must be considered by the agency in determining the amount of the penalty to be assessed
 - the seriousness of the violation
 - the economic benefit resulting from the violation
 - any history of violations
 - any good faith efforts to comply
 - the economic impact of the penalty on the violator
 - such other matters as justice may require
 - v. Appeals
 - Class I orders are reviewable in the District Court
 - Class II orders are reviewable in the Court of Appeals
- C. Federal Civil Judicial Enforcement
 - 1. Roles of the federal agencies
 - a. EPA has authority under Sec. 309(b) and 404(n) to bring a civil enforcement action for Sec. 301 violations (i.e. for unpermitted discharges in the Sec. 402 or Sec. 404 contexts), for violations of EPA or state-issued Sec. 402 permits, for violations of either Corps- or state-issued Sec. 404 permits, or for violations of any requirement imposed in any approved pretreatment program
 - b. the Corps has authority under Sec. 404(s) to bring a civil action for any violation of a Corps-issued Sec. 404 permit
 - c. it is the desire of the conference committee on the 1987 amendments for the Corps and the EPA to negotiate a new memorandum of agreement on enforcement by August 1987. Presumably, this MOA will outline the roles of the agencies concerning unpermitted discharges and the role of the Corps after-the-fact permit process.

2. EPA Sec. 309(b) actions
 - a. type of case: most cases are for unpermitted discharges or Sec. 402 permit violations.
 - b. relief requested: usually EPA will request both injunctive relief (e.g. construction of treatment facilities or restoration of the affected area) and civil penalties (see below).
 - c. enforcement process: most cases are developed according to the following process
 - violation detection by the regional office
 - case development by the regional office and referral to EPA headquarters Office of Enforcement of Compliance Monitoring (OECM)
 - case review by OECM
 - referral of the case by OECM to the Department of Justice (DOJ)
 - case review by DOJ
 - filing and prosecution of the case by DOJ (or DOJ referral to the local U.S. Attorney's Office)
3. Clean Water Act Sec. 309(d) Civil Penalties
 - a. amount: the 1987 amendments increased the amounts which courts can assess from \$10,000 per day of violation to \$25,000 per day for each violation
 - b. counting violations
 - i. the 1987 amendments essentially adopted what was EPA's policy that violations of multiple permit parameters on the same day each give rise to independent violations for which the maximum penalty may be assessed.
 - ii. role of averages: violation of an effluent limit which is expressed as an average gives rise to as many days of violation as is covered by the average, e.g. violation of a 30 day average gives rise to 30 days of violation.
 - c. penalty policy: EPA has adopted a penalty policy for Clean Water Act civil judicial enforcement actions. The policy is used to determine the minimum acceptable penalty for settlement purposes.
- D. Federal Criminal Enforcement
 1. the 1987 amendments made sweeping changes to Sec. 309(c) by establishing a three tier system based on the severity of the violation.
 2. negligent violations: Sec. 309(c)(1) makes initial negligent violations a misdemeanor punishable by a fine of \$2,500 to \$25,000 per day of violation and/or imprisonment for not more than one year. For second convictions the punishment is doubled.
 3. knowing violations: Sec. 309(c)(2) now makes an initial knowing violation a felony punishable by a fine of \$5,000 to \$50,000 per day of violation and/or by imprisonment for not more than three years. For second convictions the punishment is doubled.
 4. knowing endangerment: any person who knowingly commits a violation and knows at that time that he thereby places another person in imminent danger of death or serious bodily injury is subject to a maximum fine of \$250,000 and/or imprisonment for not more than 15 years. For second convictions the punishment is doubled.
 5. false statement: under Sec. 309(c)(4) any person who knowingly makes any false material statement, representation, or certification

in any application, record, report, plan, or other document filed or required to be maintained or who knowingly tampers with, or renders inaccurate any monitoring device or method required to be maintained commits a felony punishable by a maximum fine of \$10,000 and/or imprisonment for not more than two years. Punishment for second convictions is doubled.

D. Citizen Enforcement

1. Sec. 505: any citizen may commence a civil enforcement on his own behalf against any person who is alleged to be in violation of an effluent standard or limitation or an order issued with respect to such standard or limitation. Such an action can seek injunctive relief and civil penalties under Sec. 309(d).
2. limitation on actions: no such citizen suit may be filed
 - a. until after the required 60 days notice has been given to EPA, the state, and the violator, or
 - b. if EPA or the state has commenced and is diligently prosecuting an enforcement action.
3. controversy over the "continuing violations" requirement: the circuits are split over whether there must be violations when the citizen suit complaint is filed and whether a citizen suit may seek penalties for past violations. Recently the Supreme Court granted certiorari in the Gwaltney case and this issue will presumably be resolved in the near future

E. Defenses

1. strict liability: The Clean Water Act is a strict liability statute. This means such defenses as ignorance, good faith, intent, etc. are not defenses to liability. These are generally factors to be considered in determining penalty amount, not in determining liability. See, e.g., U.S. v. Earth Sciences, Inc., 599 F.2d 369, 374 (10th Cir. 1979)
2. upset: the federal regulations at 40 CFR 122.41(n) and most NPDES permits recognize that there may be temporary exceedences of technology-based effluent which are attributable to factors beyond the reasonable control of the permittee. Such an "upset" is an affirmative defense to liability in any enforcement action as long as the permittee can prove that it meets the stringent substantive and procedural requirements.
3. single operational upset: the 1987 amendments provide that for purposes of a Sec. 309(g) administrative action or a Sec. 309(b) civil judicial action, a "single operational upset" which leads to simultaneous violations of more than one pollutant parameter is to be treated as a single violation.
4. statute of limitations: 28 USC Sec. 2462 provides a five year statute of limitations for the collection of civil penalties. Thus, in any federal action the court or agency may impose penalties only for those violations occurring within five years of the day the complaint is filed or proposed order issued.

Section by Section Analysis
of the
Water Quality Act of 1987

February 1987

Conference Report on the Water Quality Act of 1987: S1128
found at 132 Cong. Rec. H10532 (daily ed. Oct. 15, 1986)

SECTION-BY-SECTION
ANALYSIS

WATER QUALITY ACT OF 1987

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SECTION BY SECTION ANALYSIS

WATER QUALITY ACT OF 1987

SECTION 1: Short Title.

Section 1 indicates that this Act may be cited as the "Water Quality Act of 1987." This section also contains a table of contents.

SECTION 2: Limitation on Payments.

Section 2 indicates that no payments may be made under this Act except to the extent provided in advance in appropriation Acts.

TITLE I - AMENDMENTS TO TITLE I

SECTION 101: Authorization of Appropriations.

Section 101 authorizes such sums as may be necessary for fiscal years 1983 through 1985 for research and investigation under section 104(u); grants for State program administration under section 106; training grants and scholarships under section 112(c); areawide planning and rural clean water under sections 208(f) and (j) and 304(k) the Clean Lakes program under section 314; and the general program authorization under section 517.

For fiscal years 1986 through 1990, authorizations are continued at previous levels for sections 104(u) (\$27.27 million total), 106 (\$75 million), 112(c) (\$7 Million), and 314 (\$30 million). The amendment authorizes such sums as may be necessary for water planning activities under sections 208(f) and (j), and 304(k). A general authorization of \$133 million is provided under section 517. This is a decrease from the current level of \$160 million.

Additional authorizations are provided in other sections of the Act.

SECTION 102: Small Flows Clearinghouse.

Section 102 authorizes the Agency to use a portion of the funds set aside for innovative and alternative technologies, (up to \$1 million), but not obligated within the 2 year deadline, to fund a small flows clearinghouse. The purpose of this clearinghouse is to collect and disseminate information on small flows of sewage and innovative or alternative wastewater treatment processes and techniques.

SECTION 103: Chesapeake Bay.

Section 103 establishes a Chesapeake Bay Program Office within EPA and provides for grant assistance to Bay States.

Three million dollars is authorized annually for FY 1987-1990 for the Chesapeake Bay Program Office to conduct research and collect, coordinate, and disseminate all information concerning the environmental quality of the Bay.

The Administrator is authorized to make 50% grants to the Bay States for implementation of management mechanisms. In order to receive a grant, a State must, within 1 year of enactment, approve and commit to implement all or substantially all aspects of the interstate management plan for the Bay. An annual authorization of \$10 million is provided for FY 1987-1990 for these grants.

SECTION 104: Great Lakes.

Section 104 provides policy direction and funding for programs related to the water quality of the Great Lakes. The amendment provides for the establishment of the Great Lakes National Program Office (GLNPO) within EPA and the Great Lakes Research Office (GLRO) within NOAA.

GLNPO is to develop and implement action plans to carry out the duties of the United States under the Great Lakes Water Quality Agreement of 1978. The Office is to develop a five-year plan for reducing nutrient loads, including nutrients attributable to nonpoint sources. The Office is also to conduct a five-year study of toxics in the Great Lakes, with special emphasis on toxics in sediment at five named sites. The annual budget submission of the Agency is to include a line item for GLNPO. The Administrator is to submit to Congress an annual report on the achievements of GLNPO.

The GLRO is to conduct a comprehensive program of research of Great Lakes water quality, including identification of research issues, management of the data base, and monitoring. GLRO and GLNPO are to prepare a joint research plan annually.

An authorization of \$11 million per year is provided for FY 1987-1991. Of the amount appropriated, 40% is to be used by the GLNPO to demonstrate the control and removal of toxic pollutants; 7% is to be used for nutrient monitoring; and 30% is to be transferred to GLRO.

See also section 521; Great Lakes Consumptive Use Study.

SECTION 105: Research on Effects of Pollutants.

Section 105 requires the Administrator to undertake research on the harmful effects of pollutants in water on the health and welfare of persons. Special emphasis is to be placed on bioaccumulation in aquatic species and impact on aquatic commercial and sport industries. It is intended that funding for this requirement be made available under section 104 of the Act.

TITLE II - CONSTRUCTION GRANT AMENDMENTS

SECTION 201: Time Limit on Resolving Certain Disputes.

Section 201 provides that in any case in which a dispute arises with respect to the awarding of a contract for construction of treatment works by a grantee and a party to such dispute files an appeal with the Administrator for resolution, the Administrator shall make a final decision within 90 days of the filing of such appeal.

SECTION 202: Federal Share.

Section 202 limits the eligibility of facilities to receive 75% Federal grants to those grants made pursuant to a State obligation occurring before October 1, 1990.

In addition, both the project in Altoona, Pennsylvania and the Wyoming Valley Sanitary Authority project are to be eligible to receive 75% grants. [Note: section 213 g) provides that the Wyoming Valley and Altoona projects are to be given priority for construction by the State of Pennsylvania.]

The activated bio-filter feature of the Little Falls, Minnesota treatment works is to be deemed an innovative wastewater process and technique and to receive an 85% grant. The Administrator is also authorized to fund modification or replacement of biodisc equipment if such equipment has failed to meet design performance specifications unless such failure is attributable to negligence, and if such failure has significantly increased capital or operating and maintenance costs.

The section also clarifies that assistance made available to communities through the Farmer's Home Administration may be used to provide the non-Federal share of the cost of a construction project carried out under section 201 of the Act.

SECTION 203: Agreement on Eligible Costs.

Section 203 provides that, prior to a Step 3 award or approval of plans and specifications on a Step 2 & 3 grant, EPA shall enter into an agreement with the applicant which specifies which items of the proposed project are eligible for Federal payments under section 203 of the Act. This provision is only applicable to final action on plans, specifications and estimates submitted after the 60th day following enactment of the Water Quality Act of 1986. Eligibility determinations may be audited and funds may be withheld or recovered for costs which are unreasonable, unsupported or otherwise unallowable.

SECTION 204: Design/Build Projects.

Section 204 provides that an applicant proposing to construct a wastewater treatment facility may enter into a single agreement with the Administrator providing for both the preparation of plans and specifications and the erection of a treatment works. This project management approach is available as an alternative to existing management processes in the Act. The amendment is limited to specified projects: aerated lagoons, trickling filters, stabilization ponds, land application systems, sand filters, and subsurface disposal systems. States may use no more than 20% of their allotment for design/build projects and may not use this management approach for projects of more than \$8 million.

SECTION 205: Grant Conditions; User Charges on Low Income Residential Users.

Section 205 requires that the Administrator, before approving sewage treatment construction grants for any project, determine that any required areawide waste treatment management plan under section 208 of the Clean Water Act is being implemented for such area and the proposed treatment works are included in such plan. Alternatively, the Administration may find that a plan is being developed, reasonable progress toward implementation is being made, and the proposed treatment works will be included in such plan. States in which projects are located, and the project, must also be in compliance with the continuing planning process requirements of the Act, under section 303(e), or the State must be developing such a process. The State must also be in compliance with the water quality reporting requirements of the Act under section 305(b). These requirements do not take effect until two years after enactment.

This section also allows reduced user charges (less than the proportionate share) for low income residential users of POTWs, provided that the reduced charge is adopted after public notice and a hearing.

SECTION 206: Allotment Formula.

Section 206 adopts a new formula for distributing construction grant funds and the State revolving loan fund capitalization grants among the States for FY 1987-1990. The allotment formula for FY 1986 is the same as under current law.

This section extends the minimum allotments for insular areas and the authorization of \$75 million per year for these areas through fiscal year 1990. This section also extends the set-aside for State management of the construction grants program under section 205(g) until October 1, 1994. Finally, the general prohibition against funding of separate storm sewers in section 211(c) is extended through 1990. [Note: the FY 1987 appropriations bill provides that \$1.2 billion of the FY 1987 authorization of \$2.4 billion is to be allotted under the existing formula; the allotment formula for the second \$1.2 billion is undecided at this time. Also, no State is to receive less funding under sections 205(g) and (j) in 1986 than in 1985.]

SECTION 207: Rural Set Aside.

Section 207 changes the mandatory set-aside intended to fund alternatives to conventional sewage treatment works in small communities in rural States (i.e., those with a rural population of 25% or more) to provide that the current 4% set-aside is a minimum amount, which may be increased to as much as 7.5% at the request of the Governor of a State.

In addition, the authorization of a discretionary set-aside for small communities in non-rural States of up to 4% as requested by the Governor is changed to authorize a discretionary set-aside of up to 7.5%.

SECTION 208: Innovative and Alternative Projects.

Section 208 extends the set-aside for innovative and alternative projects under section 205(i) through FY 1990. Section 205(i) provides that a minimum of 4%, but not more than 7.5% of a State's allotment be used to pay for an increase in the Federal share of innovative and alternative projects from 55% to 75%.

SECTION 209: Regional Organizational Funding.

Section 209 requires States to allocate at least 40% of water quality planning funds for use by regional comprehensive public planning organizations and appropriate interstate planning organizations. The Governor, after receiving approval from the Administrator, may allocate a lesser percentage in any fiscal year, but only where allocation of 40% will not result in significant

participation by such entities in water quality planning activities and significantly assist in development and implementation of the plan provided for in section 205(j).

SECTION 210: Marine CSOs and Estuaries.

Section 210 requires the Administrator to reserve funds from the construction grant appropriation for two purposes. Two thirds of the funds are to be made available for addressing water quality problems of marine bays and estuaries resulting from discharges from combined sewer overflows (CSOs). The remaining one third is to be made available for implementation of the National Estuary Program created by section 317. The total amount of the reserve is 1% for FY 1987 and 1988, and 1.5% for FY 1989 and 1990.

Specific provision is made that Newark Bay, NJ and the portion of the Passaic River up to Little Falls in the vicinity of Beatties Dam shall be treated as a marine bay and estuary.

SECTION 211: Authorization for Construction Grants.

Section 211 authorizes \$2.4 billion per year for construction grants for FY 1986-1988 and \$1.2 billion per year for FY 1989 and 1991.

SECTION 212: State Water Pollution Control Revolving Funds.

Section 212 establishes a new Title VI in the Clean Water Act providing for State-administered Water Pollution Control Revolving Funds (SRFs). SRFs shall be used only for design and construction of POTWs, implementation of State management programs under the new nonpoint source section of the Act (section 319), and for development and implementation of plans under the new estuaries program (section 320). SRFs must be maintained and available in perpetuity.

The amendment provides that the Administrator and the States may enter into capitalization grant agreements under this new title. States must agree to accept payments under a schedule to be developed jointly with the Administrator. Payments must be made in quarterly installments and no later than 8 quarters after the date the funds were obligated by the State or 12 quarters after the date the funds were allotted to the State, whichever is earlier.

States must provide a 20% match of Federal funds to be deposited in the fund on or before the date of each quarterly payment. States must agree to make binding commitments for assistance in an amount equal to 120% of the amount of the grant payment within one year of the receipt of such payment.

The SRF must first be used to assure maintenance of progress toward compliance with enforceable deadlines of the Act, including the municipal compliance deadline. Progress to compliance with deadlines may be assured through a funding commitment on through establishment of an enforcement schedule. State Governor's are to make the assurance of progress under this subsection.

Further, a State must demonstrate that treatment works constructed with funds directly made available by capitalization grants will meet specifically identified requirements of Title II.

The amendment specifies conditions to be placed on loans, the types of assistance available under SRFs other than loans, and limitations to prevent double benefits. Treatment works projects assisted by SRFs must be on State priority lists. The SRF may support the non-Federal share of construction projects receiving assistance from EPA under Title II only through assistance other than loans and only if such assistance is necessary to allow the project to proceed.

Sums allotted under this section remain available to the State for obligation during the fiscal year authorized and the following fiscal year. Unobligated funds will be reallocated as under Title II of the Act. Allotment to SRFs is according to the allotment of grant funds under section 205(c) of the Act. There is a reserve of 1% of a State allotment, or \$100,000 whichever is greater, for water quality planning under sections 205(j) and 303(e) of the Act.

Provision is made for the Administrator to take corrective action for noncompliance with the capitalization grant agreement. Provision is also made for audits, reports and fiscal controls. The Administrator is required to report to Congress by February 1990 on the financial status and operation of the SRFs.

A state may use up to 50% of its construction grant allotment to capitalize its SRF in 1987 and 75% for 1988. The full State allotment may be used by the SRF in subsequent years. Funds reserved under section 205(j) may not be transferred to the SRF.

The amendment authorizes a total of \$8.4 billion: \$1.2 billion for FY 1989 and 1990, \$2.4 billion for FY 1991; \$1.8 billion for FY 1992, \$1.2 billion for FY 1993, and \$.6 billion for FY 1994.

SECTION 213: Improvement Projects.

SRFs shall be used only for design and construction of POTWs, implementation of State management programs under the new nonpoint source section of the Act (section 319), and for development and implementation of plans under the new estuaries program (section 320). SRFs must be maintained and available in perpetuity.

Section 213 provides for specific wastewater treatment projects. Avalon, California will receive a grant of \$3 million from funds allotted to the State of California under the Act for FY 1987 for improvements to the POTW.

Walker and Smithfield Townships, Pennsylvania will receive grants from funds allotted to the State for the purposes of developing a collector system in the case of the former township and for the purpose of rehabilitating and extending a collector system in the case of the latter. Grants are to be from the Governor's discretionary fund under section 201(g)(1).

Taylor Mill, Kentucky will receive a grant of \$250,000 for the repair and reconstruction of the POTW from the FY 1986 allotment to the State of Kentucky.

Nevada County, California will receive a grant out of FY 1987 funds allotted to the State for the construction of a collection system for the Tahoe-Truckee Sanitary District's Regional wastewater treatment facility. The grant is to be from the Governor's discretionary fund under section 201(g)(1).

Wanaque, New Jersey will receive a 75% grant from the State allotment for construction of a sewage treatment facility.

Lena, Illinois will receive a 75% grant from the State allotment for replacement of a moving bedfilter press for the POTW.

Projects for the Wyoming Valley Sanitary Authority and Altoona shall be given priority for funds from the allotment to the State of Pennsylvania. [Note: Section 202 provides that these grants are to be a 75% Federal funds.]

SECTION 214: Chicago Tunnel and Reservoir Project.

Section 214 provides that the Chicago Tunnel and Reservoir Project, an otherwise ineligible project, may receive grants from the allotment to the State of Illinois without regard to the limitation on use of funds for such projects to 20% of a State allotment. The Administrator must determine that such project meets the cost-effectiveness requirements of sections 217 and 218 of the CWA without redesign or reconstruction. [Note: the Water Resources Act includes a provision authorizing such assistance to be 75% Federal funds.]

SECTION 215: Ad Valorem Tax Dedication.

Section 215 permits the Town of Hampton and the City of Nashua, New Hampshire to continue using its ad valorem user charge systems for collecting the costs of operation and maintenance of their sewage treatment works.

TITLE III - STANDARDS AND ENFORCEMENT

SECTION 301: Compliance Dates.

The amendment establishes compliance deadlines for technology-based requirements of the Act. Deadlines are extended for Best Available Technology (BAT) effluent limits applicable to priority toxic pollutants under section 301(b)(2)(C), other toxic pollutants under section 301(b)(2)(D), and non-conventional pollutants under section 301(b)(2)(F), as well as best conventional technology limits (BCT) for conventional pollutants under section 301(b)(2)(E). The amendment also sets deadlines for best practicable control technology limits established under section 301(b)(1)(A)(i) requiring a level of control substantially greater based on fundamentally different control technology than under permits for an industrial category issued before January 1, 1982, and for best professional judgement effluent limitations (BPJ) under section 402(a)(1). The deadline in each case is as expeditiously as practicable but in no case later than three years after the date the requirement is promulgated or established, and in no case later than March 31, 1989.

EPA is required to promulgate BAT guidelines for organic chemicals and pesticide categories by December 31, 1986.

SECTION 302: Modification for Non-Conventional Pollutants.

Section 302 provides that modifications from BAT requirements under section 301(g) of the Act can be granted for only five specified nonconventional pollutants (ammonia, chlorine, color, iron, total phenols (YAAP)).

The amendment provides that the Administrator may list additional pollutants in response to petitions. The petitioner must provide sufficient information for the Administrator to assess the pollutant to determine if it is a toxic pollutant. If it is found to be toxic, the Administrator must include the pollutant on the 307(a)(1) list of toxic pollutants. If it is not found to be toxic, the Administrator must determine that adequate methods and sufficient data are available to determine whether a modification under this section is appropriate. The burden of proof for listing a pollutant is on the petitioner.

A petitioner may file an application for modification simultaneously with a petition for listing a pollutant. Applications are to be decided within one year of the date of application or, in the case where a petition for listing a pollutant has been approved, within one year of approval. Application for modifications with respect to ammonia, chlorine, color, iron or total phenols (yaap) pending on date of enactment must be decided within one year of enactment.

SECTION 303: Discharges into Marine Waters.

Section 303 establishes additional conditions for a permit modification under section 301(h) of the Act which provides for waivers from the requirement for secondary treatment of municipal discharges into marine waters.

The discharge of pollutants in accordance with modified requirements must not interfere, alone or in combination with other pollutant sources, with attainment or maintenance of water quality requirements.

The amendment adds new criteria to section 301(h) for POTWs serving populations of 50,000 or more. These cities must have an approved pretreatment program in place and must demonstrate that for any toxic pollutant not specifically regulated by pretreatment standards, the POTW and industrial user together will remove as much of the toxic pollutant as if the POTW had installed secondary treatment and had no pretreatment program. Indirect sources must be in compliance with applicable pretreatment requirements and the POTW must enforce the requirements.

The provision also requires that POTWs achieve at least primary or equivalent treatment and meet marine water quality criteria established under section 304(a)(1) of the Act at the time the section 301(h) modification becomes effective. Primary or equivalent treatment means treatment by screening, sedimentation, and skimming adequate to remove at least 30% of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate.

The amendment adds a new provision which would require that, for a permit to be issued under this subsection, marine waters must not contain significant amounts of effluent previously discharged from the POTW. Discharges into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, etc., or which do not meet applicable water quality standards are prohibited.

Applications for modifications tentatively or finally approved before the date of enactment are exempted from the new requirements under this amendment, except that the amendments shall apply to all renewals of permits after the date of enactment.

The amendment provides that no permit shall be issued for a discharge modification under section 301(h) for the discharge of pollutants into the New York Bight Apex.

Finally, the amendment allows a period of 30 days after enactment for a POTW, with an existing contract to discharge into another treatment works which has applied for a modification under section 301(h), to apply in its own right. This provision addresses the needs of the Irvine Ranch District in California.

SECTION 304: Filing Deadline for Treatment Works Modification.

Section 304 extends until 180 days after enactment the deadline for POTWs to apply, under section 301(i)(1) of the Act, for extensions of the 1977 date by which secondary treatment and water quality standards in effect prior to 1977, must be achieved. The deadline for an extension is July 1, 1988. Treatment works on a compliance schedule established by a court order or final Agency or State order do not have the opportunity to apply for an extension under this subsection.

SECTION 305: Innovative Technology Compliance Deadlines for Direct Dischargers.

Section 305 amends section 301(k) to extend the date for compliance with effluent limits applicable to innovative technology from July 1, 1987, to a date 2 years after the date for compliance with the effluent limitation which is otherwise applicable. The bill also amends section 301(k) to permit the same extension for conventional pollutants. [Note: section 309 of this Act amends section 307 of the Clean Water Act to provide the same extension to indirect dischargers.]

SECTION 306: Fundamentally Different Factors.

Section 306 provides EPA a clearly defined authority to modify a minimum, national technology based treatment requirement for an individual facility within an industry if the facility is found to be fundamentally different from other facilities within the industry. The Administrator, with State concurrence, is authorized to establish alternative requirements from BAT, BCT, and PSES.

An applicant must demonstrate that the facility is fundamentally different based on factors set out in sections 304(b) and (g) of the Act. These eligible factors include the age of equipment and the facilities, the processes employed, engineering aspects of various types of control techniques, process changes, non-water quality environmental impact, and other factors. The amendment specifically excludes cost as a basis for establishing a fundamental difference.

In addition, the applicant must have submitted the information and data on which the application is based during the rulemaking process, unless there was no reasonable opportunity for such submission. Applications must be submitted within 180 days after the publication of the guideline or standard. The Agency has 180 days to approve or deny the application; supplemental information may be accepted within that time period. Pending FDF applications are to be considered under the provisions of this section.

The Administrator must report to Congress on the status of applications for modifications every 6 months.

The amendment also requires the Administrator to establish and collect fees from applicants for modifications under sections 301(c), (g), (i), (k), (m), and (n), section 304(d)(4), and section 316(a). Fees are deposited in a special fund in the U.S. Treasury entitled "Water Permits and Related Services". Such funds are to be available for appropriation to carry out the Agency activity for which the fee was collected.

The amendment also suspends the application of the phosphate fertilizer subcategory of the fertilizer manufacturing guidelines to facilities which had commenced operation on or before April 8, 1974 and for which EPA has proposed withdrawal of the applicable effluent limitations guidelines, and provides that EPA shall issue BPJ permits to remain in effect until EPA issues permits based on a revised guideline. This amendment is limited to the four facilities located in Louisiana.

SECTION 307: Coal Remining Operations.

Section 307 provides for Best Professional Judgment (BPJ) case-by-case limitations on pH, iron, and manganese from pre-existing discharges in a remined area, rather than limits established in the effluent guideline. The levels for these pollutants may not exceed those existing before remining began. The applicant must demonstrate that the remining operation provides the potential for improved water quality. The discharge must also comply with State water quality standards.

SECTION 308: Individual Control Strategies for Toxic Pollutants.

Section 308 provides for development of control strategies for toxic pollutants. Within 2 years of enactment, each State is to prepare and submit to EPA for review and approval a list of those waters within the State which will not meet water quality standards or maintain beneficial uses due to toxic pollutants after implementation of BAI, new source performance standards, and pretreatment standards. For the segments listed, the State is to identify those segments which are impaired due to the discharge of toxic pollutants from point sources. For each such segment, the State is to identify the source of the discharge causing impairment and the amount of pollutants from each source. States are also to provide an individual control strategy under section 402 for each point source identified which will result in reductions in toxic pollutants which, in combination with other controls on point and nonpoint sources, will result in

achievement of the water quality standard within 3 years after the strategy is established.

EPA has not more than 120 days after the end of the 2 year period in which to approve or disapprove a State list and strategy. If a State fails to submit information or EPA disapproves a strategy, the EPA shall, within one year after the 120 days, implement the requirements for listing and strategies for such State. Judicial review of control strategies is provided under the amendment. The Agency is required to develop and publish guidance to the States concerning lists and control strategies within 9 months of enactment.

Within 2 years of enactment, EPA, after consultation with the States, is required to develop and publish information on methods for establishing and measuring water quality criteria for toxics on other bases than pollutant-by-pollutant criteria, including biomonitoring and assessment methods.

Whenever a State reviews water quality standards as required under the Act, the State shall adopt specific numeric criteria for all toxic pollutants: which are included in section 307(a); for which EPA has developed criteria; and the discharge or presence or absence of which in the affected waters could reasonably be expected to interfere with designated uses. Where numerical criteria are not available for such pollutants, the State shall adopt criteria based on biological monitoring or assessment methods.

Section 302(b) of the Act is amended to provide that prior to establishment of any water quality based effluent limitation or control strategy under section 302(a), the Administrator shall publish the proposed limitation and hold a public hearing within 90 days. The Administrator may modify an effluent limitation for pollutants other than toxic pollutants if the applicant demonstrates that there is no reasonable relationship between economic and social costs and benefits to be attained. The Administrator may modify an effluent limitation for toxic pollutants for a single period not to exceed five years if the applicant demonstrates that the modified requirement is the maximum control within the economic capability of the owner and it will result in reasonable further progress.

The Administrator is required to publish a plan within 12 months of enactment and biennially thereafter, in the Federal Register to: (1) establish a schedule for the annual review and revision of promulgated effluent guidelines, (2) identify categories discharging toxic or nonconventional pollutants for which guidelines have not been previously published, and (3) establish a schedule for promulgation of effluent guidelines for those identified unregulated categories within 4 years of enactment, or three years after publication of later plans.

The Administrator is to study the water quality improvements achieved by application of BAT and report to the Congress within two years.

SECTION 309: Pretreatment Standards.

Section 309 amends section 307 of the Act to provide a 2 year extension for compliance with categorical pretreatment standards for existing, but not new, facilities using an innovative system that meets the requirements of section 301(k). The innovative process must have the potential for industrywide application. No facility that receives an extension can cause or contribute to any violation of discharge permit or sludge disposal provisions of the Act.

The Agency is directed to increase the number of employees to effectively implement pretreatment requirements.

SECTION 310: Inspection and Entry.

Section 310 imposes a penalty on any authorized representative of the Administrator who improperly discloses confidential information obtained in the inspection and monitoring of a discharger. All information reported to or obtained by EPA shall be made available, upon written request, to any committee of the Congress. Section 310 also clarifies that authorized contractors may be authorized representatives of the United States.

SECTION 311: Marine Sanitation Devices.

Section 311 would allow a State to impose more stringent standards than those imposed by the Federal government with respect to the design, manufacture, installation, or use of a Marine Sanitation Device on a houseboat, which is used primarily as a residence. States are authorized to enforce Federal standards for all vessels.

SECTION 312: Criminal Penalties.

Section 312 amends section 309(c) of the Act to expand penalties for persons who violate certain Clean Water Act requirements.

The bill provides specific penalties for persons who negligently or knowingly violates section 301, 302, 306, 307, 308, 318 or 405 of the Act or any 402 or 404 permit constitution or any requirement impaired by a pretreatment program. Penalties for negligent violations are \$2,500/\$25,000 per day of violation or one year in prison or both. Knowing violations are twice the fine, and three years in prison, or both. In both cases, penalties for a second offense are doubled.

In the event of a knowing violation, greater penalties are established for actions placing another person in imminent danger of death or serious bodily injury. Penalties are up to 15 years in prison with fines of \$250,000 for individuals and \$1 million for organizations.

This section is amended to increase the penalty for false statements from six months to two years. The fine of not more than \$10,000 for false statements remains unchanged, but penalties are doubled for second offenses.

For all classes of penalties (i.e., criminal, judicial, and administrative), the bill provides that a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

SECTION 313: Civil Penalties.

Section 313 provides that violators of NPDES and pretreatment program requirements or section 402 and 404 permits are subject to a maximum civil penalty of "\$25,000 per day for each violation", in contrast to the previous maximum of "\$10,000 per day of such violation." The amendment clarifies that a person violating a requirement imposed in an approved POTW pretreatment program is subject to civil penalty. The bill confirms that each distinct violation is subject to a separate daily penalty. A single operational upset constitutes one violation even if more than one parameter is violated.

States are not required to revise approved permit programs to be consistent with these amendments until July 1, 1988. States are not required to have identical maximum penalty amounts but must meet what EPA defines as minimal penalty authority.

SECTION 314: Administrative Penalties.

Section 314 provides EPA with new authority to assess administrative civil penalties for violations of selected sections of the Act and violations of NPDES permit conditions. EPA is also authorized to issue administrative penalties for unpermitted discharges violating section 404 of the Act and for violations of State-issued 404 permits. The Secretary of the Army may

issue administrative penalties for violations of 404 permits issued by the Corps of Engineers. EPA must consult with the State in which the violation has occurred before assessing a penalty.

The amendment creates two "classes" of penalties, which differ with respect to procedure and maximum assessment.

A Class I penalty may not exceed \$10,000 per violation, and a maximum amount of \$25,000. EPA must give the person being assessed a penalty written notice of the proposed assessment. An opportunity to request a hearing must also be provided. This hearing is not subject to sections 554 and 556 of the Administrative Procedure Act (APA).

A Class II penalty may not exceed \$10,000 per day for each day during which the violation continues, and a maximum amount of \$125,000. Class II penalties shall be assessed and collected after notice and opportunity for hearing on the record in accordance with section 554 of the APA.

Factors relating to the amount of administratively assessed penalties are described in the amendment and the rights of interested persons are specified. Judicial review for Class I penalties is in the District Courts; Class II penalties are reviewed in the Courts of Appeals.

In cases where EPA or the State is diligently prosecuting an administrative penalty, or an administrative penalty has been paid, the violation shall not be subject to a civil judicial penalty, a penalty under the oil spill provisions of the Act (section 311), or citizen suit action.

Citizen suits for penalties are not barred by an administrative assessment if the citizen suit is filed before the administrative proceeding begins, or if notice of intent to sue is given before the administrative proceeding begins and suit is filed within 120 days of the notice.

SECTION 315: Clean Lakes.

Section 315 requires States to submit a biennial report on water quality in lakes. Reports by the states to EPA are to provide a list and description of the quality of lakes and a description of methods and procedures to control sources of pollution. The report is also to include methods and procedures to mitigate the harmful effects of acidity.

The State reports are to be included in reports prepared under section 305(b) of the Act, beginning with the report required by April 1, 1978. States failing to submit reports are ineligible for grants under this section. Within 180 days after receipt of biennial reports from the States, the Administrator shall compile a report to Congress on the status of water quality in lakes.

The provision also establishes a clean lakes demonstration program and directs the Administrator to give priority to several specific demonstration projects. The demonstration program is supported by a total authorization of \$40 million. An additional \$15 million is authorized for demonstration of acidified lakes mitigation.

The Administrator is directed to develop a lake restoration guidance manual within 1 year and to revise the manual biennially.

SECTION 316: Management of Nonpoint Sources of Pollution.

Section 316 establishes a national program for the management of nonpoint sources of pollution. Each State is required to develop reports which identify State waters, which without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals or requirements of the Act. The reports are also to include identification of categories and subcategories of nonpoint sources, as well as particular nonpoint sources, which contribute pollution to identified waters and identify State management processes and control programs.

States are also to submit a management program for control of nonpoint sources of pollution over a four year period. Management programs are to include specific control programs, schedules, legal authorities and funding sources. The report and management program is to be submitted by a State to EPA within 18 months of enactment. The Administrator has 180 days after submittal to approve or disapprove the report and program. If a State does not prepare a report or management program, EPA must prepare an assessment report within 30 months of enactment. EPA shall provide technical assistance to a State for preparation of a management program.

Upon approval of the report and management program, States are eligible for grants from EPA to assist in implementing the management program. The Federal share of grants shall not exceed 60%. Implementation is limited to program management costs and does not include cost sharing, construction, or related expenses, except if such expenses are for demonstration projects. Grants are also provided for protecting ground-water quality with the maximum Federal share set at 50%.

An authorization of \$400 million is provided for grants for nonpoint source control programs and ground-water programs over 4 years. An authorization of \$7.5 million per year is provided for grants for ground water programs within the total authorization. In making grants, the Administrator shall give priority to effective

mechanisms which will control particularly difficult nonpoint source problems, implement innovative methods or practices, control interstate nonpoint source pollution, or carry out ground water quality protection activities.

Each State is required to submit an annual report to EPA and the Administrator is required to report annually to Congress on the program. A final report from the Administrator to Congress is due January 1, 1990.

Not less than 5% of funds annually appropriated under the authorization for this section is to be available to the Administrator to maintain personnel at levels adequate to carry out this section.

A new reserve under section 205(j)(5), 1% or \$100,000 whichever is greater, may be used to develop and implement the State management program. Any funds in excess of \$100,000, which the State does not request for use for nonpoint programs, may be used in that State for other purposes under Title II. In addition, a State Governor may use discretionary funds available under section 201(g)(1) to fund implementation of nonpoint and groundwater programs.

SECTION 317: National Estuary Program.

Section 317 states that Congress finds estuaries to be threatened by human-induced stresses and that it is in the national interest to maintain their ecological integrity through long-term planning and management.

The Governor of a State or the Administrator on his own initiative may nominate an estuary of national significance for the purpose of requesting a management conference to develop a comprehensive plan for the estuary. Priority consideration is to be given to Long Island Sound, Narragansett Bay, Buzzards Bay, Delaware Inland Bays, Puget Sound, New York-New Jersey Harbor, Delaware Bay, Albemarle Sound, Sarasota Bay, San Francisco Bay, and Galveston Bay.

Management conferences are to develop comprehensive conservation and management plans which recommend priority corrective actions and compliance schedules addressing point and nonpoint sources of pollution. The management conference must also review any Federal financial assistance program or development project to determine whether such assistance or project is consistent with the management plan. Management conferences are convened for up to 5 years and may be extended or reconvened. Plans must be approved by the Administrator with the concurrence of the affected Governors.

The Administrator is authorized to make grants not to exceed 75% to assist in work necessary for the development of a conservation and management plan. The amendment authorizes \$12 million

per year for FY 1987 - 1991. Funds authorized under Titles II and VI and section 319 may be used to assist States with implementation of plans. Up to \$5 million per fiscal year of the appropriated amount shall, at the Administrator's discretion, be provided to NOAA to do water quality monitoring and ecosystem assessment. [Note that section 210 of this bill provides for additional funds for implementation of this section.]

Grantees under this provision shall report to the Administrator within 18 months of receipt of the grant and biennially thereafter. The Administrator, in cooperation with the Administrator of NOAA, is required to report biennially to the Congress on the results of monitoring and research efforts.

SECTION 318: Unconsolidated Quaternary Aquifer.

Section 318 prohibits the location or authorization of any landfill, surface impoundment, waste pile, injection well or land treatment facility in the Unconsolidated Quaternary Aquifer in New Jersey or in its recharge areas.

TITLE IV - PERMITS AND LICENSES

SECTION 401: Stormwater Runoff From Oil, Gas and Mining Operations.

Section 401 exempts uncontaminated stormwater discharges from mining operations or oil and gas exploration, production, processing, or treatment operation or transmission lines from the requirement to obtain an NPDES permit.

SECTION 402: Additional Pretreatment of Conventional Pollutants Not Required.

Section 402 prohibits EPA from requiring additional pretreatment of conventional pollutants by indirect dischargers when a POTW fails to meet its permit requirements because of operational or design failures of the treatment works.

SECTION 403: Partial NPDES Program.

Section 403 allows for the partial delegation to the States of the NPDES program. A partial delegation of the NPDES program must cover at a minimum either administration of a major category of discharges or a major component of the State's NPDES program. Partial delegation which covers a major category of discharges must cover all the discharges under the jurisdiction of a State department or agency. A State requesting partial delegation must submit a plan for assumption of the remainder of the program within 5 years.

A State may return, or the Administrator may withdraw, approval of NPDES responsibilities: (1) in the case of an approved partial permit program covering administration of a major category only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; (2) in the case of a State partial permit program covering a major component, only if the entire phased component is returned or withdrawn. Parts of a NPDES program approved prior to the date of enactment may not be returned.

SECTION 404: Anti-backsliding.

Section 404 prevents backsliding from best professional judgment (BPJ) technology-based and water quality-based limits except under certain specified circumstances.

BPJ based permits may be modified if: material and substantial alterations or additions to the permitted facility occurred after issuance of the permit which justify application of a less stringent effluent limitation; information is available which was not available at the time the permit was issued; technical or legal interpretation mistakes were made in issuing the previous permit; a less stringent effluent limitation is necessary because of events beyond the permittee's control; the permittee has received a permit modification under sections 301(c), (g), (h), (i), (k), (n) or 316(a) of the Act; or proper treatment installed and properly operated and maintained nevertheless fails to achieve the previous effluent limitations. For water quality-based permits, all of the above circumstances may also lead to the same result, except for technical mistakes or mistaken interpretations of law.

Neither the new information exception for both BPJ and water quality-based permits, nor the mistake of fact or law exception for BPJ permits, allows permits to be adjusted to require less stringent effluent limitations with respect to any revised waste load allocation or any alternative grounds for translating water quality standards into effluent limitations. An exception to this rule is the circumstance where the cumulative effect of revised wasteload allocations results in a decrease in pollutants and the revised allocations are not due to elimination of a discharger or discharge reductions due to compliance with requirements of the Act.

The amendment also specifies additional conditions for modification of water quality-based permits. Where the applicable water quality standards have not been attained, the total maximum daily load or other wasteload allocation may be revised only if the cumulative effect is that the standard will be met, or the designated use is downgraded in accordance with regulations. Where water quality in the receiving waters exceeds or equals that required by applicable standards, backsliding can proceed only if consistent with the CWA antidegradation policy.

Applicable effluent guideline limitations are bottom line requirements and no permit can be issued that would violate water quality standards.

The Administrator is required to submit a report and recommendations to Congress within 2 years of enactment on the extent to which States have reviewed and revised water quality standards or modified permits to reflect revisions in the standards.

SECTION 405: Municipal and Industrial Stormwater Discharges.

Section 405 establishes new procedures requirements and deadlines for the regulation of stormwater discharges.

Many stormwater dischargers are relieved of the obligation to obtain a NPDES permit until October 1, 1992. Categories of dischargers which are excepted from this temporary waiver include: discharges which are currently permitted, discharges associated with industrial activity, discharges from municipal separate storm sewer systems serving a population of 100,000 or more, and any discharge which EPA or State determines contributes to a violation of a water quality standard or is a significant contributor of pollutants.

These dischargers are to submit applications in accordance with schedules specified in the statute and are not required to have a permit prior to the date established in the statute unless the Administrator promulgates regulations specifying an earlier permit application date. In the case of a discharge contributing to a water quality standard violation or deemed a significant contributor of pollutants, the Administrator or a State may require a permit application at any time.

The following schedule for developing necessary regulations and issuing permits is included in the amendment.

- Within 2 years, EPA is to develop regulations concerning permit requirements for industrial and large municipal (greater than 250,000 population) sources. Within 3 years, applications from industrial and large municipal sources must be filed. Within 4 years, permits are to be issued for these sources. Within 7 years, these sources are to be in compliance with permits.
- Within 4 years, EPA is to establish regulations for applications by other municipal sources (greater than 100,000 population). Within 5 years, applications from these sources must be filed and within 6 years, permits are to be issued. Within 9 years, these sources are to be in compliance with permits.

The amendment provides that permits for municipal discharges may be issued on a system wide basis, shall include a requirement effectively prohibiting non-stormwater discharges to storm sewers, and shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Industrial dischargers are still subject to BAT/BCT requirements.

EPA is to study all other stormwater discharges and provide reports to Congress in October of 1988 and 1989. EPA is to issue regulations providing for control of these other sources to the extent necessary to protect water quality, by October 1, 1992.

SECTION 406: Sewage Sludge.

Section 406 amends the Act to establish a timetable for for the promulgation of toxic contaminant criteria for sewage sludge use and disposal, to establish a public health and environmental basis for these criteria, and to provide authority to implement and enforce criteria for toxic and other pollutants. The applicability of the sludge criteria is is expanded to include sludge from any treatment works that treats domestic sewage, whether publicly or privately owned.

EPA is required to identify toxic pollutants that may adversely impact sewage sludge and issue 2 sets of regulations to address these pollutants. By November 30, 1986, EPA is required to identify toxic pollutants which may be present in sewage sludge in concentrations which may affect public health or the environment and propose regulations specifying acceptable management practices for sludge containing such toxics. Numerical limitations for each such pollutant for each use identified must be established adequate to protect public health and the environment from any reasonably anticipated adverse effects. If numerical limits are not feasible, EPA may promulgate management practices or operational standards. Final regulations are required by August 31, 1987.

A second set of regulations are required to be proposed by July 31, 1987, regarding those pollutants not addressed in the first round of regulations. Final regulations for these pollutants are required by June 15, 1988.

These regulations shall be reviewed by the Administrator every 2 years and additional pollutants identified for regulation. Compliance is required within 12 months after publication; 2 years if construction of a treatment facility is required.

This amendment requires that NPDES permits are to include requirements for sludge use and disposal contained in regulations to be developed under this section unless permitted under a comparable Federal permit program or an approved State permit program. Prior to the promulgation of such regulations, the Administrator shall impose sludge conditions in NPDES permits for POTWs or take other measures to protect the public health and the environment from toxic pollutants in sewage sludge. EPA shall promulgate procedures for approval of State programs by December 15, 1986.

In the wake of the U.S. Court of Appeals, 3d Cir., decision striking down the 1984 removal credits rule, this amendment would stay until August 31, 1987, the aspect of the court decision affecting sludge requirements under section 405(d) of the Act for POTWs now approved to grant removal credits and for POTWs with removal credits applications pending (submitted by the date of enactment of the Water Quality Act of 1937). The stay of this aspect of the court decision terminates after August 31, 1987.

No new removal credits can be granted to POTWs until after the Agency promulgates the first phase of the sludge regulations. In addition, the legislative history clarifies that evaporation of volatile organic toxic pollutants is not treatment and that removal credits may not be granted for such pollutants on the basis of evaporation.

The Administrator is authorized to conduct or initiate scientific studies, demonstration projects, and public information and education projects designed to promote the safe and beneficial management or use of sludge. Five million dollars is authorized for this purpose beginning in FY 1987.

SECTION 407: Log Transfer Facilities.

Section 407 requires the Administrator and the Secretary of the Army to enter into an agreement to designate a lead agency to process permits required under section 402 and 404 of the Act for discharges associated with construction and operation of log transfer facilities where both provisions apply.

The Administrator shall determine whether a section 404 permit, issued before October 22, 1985, is a satisfactory substitute for a section 402 permit. The Administrator may modify such a permit after demonstration that the section 404 permit does not satisfy the requirements of the Act.

TITLE V - MISCELLANEOUS PROVISIONS

SECTION 501: Audits.

Section 501 authorizes EPA to enter into noncompetitive procurement contracts with independent State audit organizations, consistent with the Single Audit Act, in order to audit any recipient of Federal assistance under the Act.

SECTION 502: Commonwealth of the Northern Mariana Islands.

Section 502 amends the definition of "State" to include the Commonwealth of the Northern Mariana Islands.

SECTION 503: Agricultural Stormwater Discharges.

Section 503 expressly excludes agricultural stormwater discharges from the definition of a point source. Thus, agricultural stormwater discharges are not subject to NPDES permit requirements.

SECTION 504: Protection of Interests of United States
in Citizen Suits.

Section 504 modifies the citizen suit provision of the Act (section 505) to provide that the Attorney General and the Administrator of EPA must be notified when such a suit is commenced, and to provide that no consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Administrator and Attorney General.

SECTION 505: Judicial Review and Award of Fees.

Section 505 revises the provisions of section 509 of the Act governing judicial review of certain actions of the Administrator.

First, the amendment clarifies where petitions for review of certain Administrator's actions, including review of effluent guidelines and Federally issued NPDES permits, may be filed, by specifying the Federal judicial district where the applicant resides or transacts business which is directly affected by the action in question.

Second, the amendment extends the time for filing a petition for review from 90 to 120 days from the date of the Administrator's action.

Third, the amendment adds a new procedure for selecting the appropriate Circuit Court of Appeals in certain instances when multiple applications have been filed in more than one Court. The Administrator must in writing promptly advise the Administrative Office of the United States Courts who then selects the court which shall hear the case through a "system of random selection." The selected court may transfer the case to another court.

Fourth, the amendment allows the award of attorney and expert witness fees and other costs of litigation to any prevailing or substantially prevailing party when deemed appropriate by the court.

SECTION 506: Indian Tribes.

Section 506 provides new authority to Indian Tribes. EPA is to study the needs of Indian Tribes for sewage treatment works, including how Indians can be assisted in planning and constructing treatment works, and to report to Congress within one year. Beginning in FY 1987, one-half of 1% of construction grants appropriations shall be reserved for grants of up to 100% of the cost of planning and construction of sewage treatment works to serve Indian Tribes.

Indian Tribes are to be treated as States as necessary to carry out provisions of Title II and sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, and 404 of the Act. EPA has 18 months to promulgate final regulations which specify how Tribes shall be treated as States. The Administrator shall provide a mechanism for resolution of any unreasonable consequences that arise as a result of differing water quality standards set by States and Tribes located on common bodies of water. Tribes and States may enter into cooperative agreements to ensure consistent implementation of the requirements of the Act; the agreements are subject to the review of the Administrator.

Tribes are eligible for up to one third of 1% of the amount appropriated for nonpoint source programs under section 319.

SECTION 507: Definition of a Point Source.

Section 507 explicitly includes a landfill leachate collection system in the definition of point source, thus subject to NPDES requirements unless the system is used for agricultural purposes.

SECTION 508: Special Provisions Regarding Certain Dumping Sites.

Section 508 amends the Marine Protection, Research, and Sanctuaries Act (MPRSA) with regard to the ocean dumping of sewage sludge in the New York Bight area. The amendment adds a new section 104 A to the MPRSA to establish limits on such dumping, both for the New York Bight Apex Site, including the 12-Mile Site, and the 106-Mile Site. It prohibits sewage sludge dumping in the New York Bight Apex after December 15, 1987 (or the date on which EPA determines such sewage sludge can reasonably be dumped at a designated non-Apex site, whichever is earlier). No person may apply for a permit to dump sewage sludge at the Apex site, except for public authorities that on November 2, 1983, were authorized under court order to dump at the Apex site. Restrictions are also established on the use of the 106-Mile Site for sewage sludge dumping by limiting use of the 106-Mile Site for sewage sludge dumping to the sewage sludge dumpers previously authorized by court order to use the 12-Mile Site.

SECTION 509: Ocean Discharge Research Projects.

Section 509 authorizes the Administrator to issue a one time research permit to the Orange County, CA, Sanitation Districts for the discharge of preconditioned municipal sewage sludge into the ocean. The permit is to enable research to be conducted on the effects of disposing of sewage sludge by pipeline into ocean waters.

In issuing such a permit, the Administrator must find that Orange County is actively pursuing long-term land-based options for handling its sludge, there is no likelihood of an unacceptable adverse effect on the environment, and the permit would meet the requirements of section 301(h)(2). The permit term is 5 years and monitoring results must be transmitted to Congress every 6 months. This permit is to be terminated at any time the EPA determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a cause and effect relationship cannot be shown.

SECTION 510: San Diego, California.

Section 510 addresses the problems faced by the City of San Diego as a result of raw sewage emanating from Tijuana, Mexico. The amendment authorizes grants for construction of defensive treatment works (i.e. interceptors and catch basins) to intercept sewage flowing from Mexico northward across the border.

The Administrator may also make grants for treatment works in San Diego, to treat waste from San Diego or Mexico, but must first determine that treatment facilities in Mexico and defensive systems are not sufficient to address the pollution problem. The amendment also authorizes San Diego to use any treatment works no longer needed for Mexican sewage and requires that San Diego provide reimbursement of 45% of construction costs in that event.

Finally, the Administrator may consider approval of discharge of pollutants from an ocean outfall consistent with the goals of the Act and the provisions of section 301(h), except compliance with subsection 301(h)(5), relating to pretreatment, may be waived.

SECTION 511: Limitation on Discharge of Raw Sewage by New York City.

Section 511 limits the amount of raw sewage discharged by the North River and Red Hook treatment plants now under construction. Raw discharges will be limited after August 1, 1986 and August 1, 1987, respectively if advanced preliminary treatment is not achieved by those dates, as required by the consent decree signed December 29, 1982 by the U.S., the State of New York and the City of New York.

The raw discharge in any 30 day period may not exceed 30 times the average daily raw discharge during a specific 1 year base period. Waivers may be issued in certain circumstances including seasonal variations or rain, but may not be issued due to lack of Federal funding. The deadline for either project may be extended by the Administrator to account for circumstances beyond the control of the City, but may not be extended on the basis of lack of Federal funding.

Violations of discharge limitations are to be treated as violations of section 301 of the Act. If a determination is made that a violation has occurred, then the Administrator must initiate enforcement action within 30 days.

SECTION 512: Oakwood Beach and Red Hook Projects. New York.

Section 512 provides that, notwithstanding any provision of the Act, the Administrator shall pay, to the extent provided in appropriation acts, in the same proportion as the Federal share of other project costs, all expenses for the relocation of facilities for the distribution of natural gas for these two projects. A sum of \$7 million is authorized beginning in FY 1987.

SECTION 513: Boston Harbor and Adjacent Waters.

Section 513 authorizes EPA to make grants (not exceeding 75%) to the Massachusetts Water Resource Authority to assess the causes of Boston Harbor's pollution, develop a plan to improve the Harbor, and construct secondary treatment plants in Boston, including emergency improvements at the Deer Island plant. The amendment authorizes \$100 million for fiscal years beginning in FY 1987.

SECTION 514: Wastewater Reclamation Demonstration.

Section 514 authorizes \$2 million, at an 85% federal share, for the San Diego Reclamation Agency to demonstrate and field test innovative water reclamation processes for public use.

SECTION 515: Des Moines, Iowa.

Section 515 authorizes a 75% grant to Des Moines, Iowa for the construction of the main treatment plant, not to exceed \$50 million for fiscal year beginning in FY 1987.

SECTION 516: De Minimis Discharges.

Section 516 requires EPA to conduct a study to determine if there are discharges which, in terms of volume, concentration, and type of pollutant, are not significant. The purpose of the study is to determine how best to regulate such discharges. The Agency is required to report to the Congress within 1 year with recommendations on the best methods of regulating any such discharges.

SECTION 517: Study on Effectiveness of Innovative and Alternative Processes and Techniques.

Section 517 requires EPA to study the effectiveness of innovative and alternative (I/A) techniques and reasons for the failure of any State to obligate I/A funds. The Agency is required to report to Congress within 1 year of enactment with recommendations for providing more incentives for using I/A treatment processes and techniques.

SECTION 518: Study of Testing Procedures.

Section 518 requires EPA to study test procedures for analysis of pollutants and evaluate potential modifications to existing procedures. The Administrator is required to report to the Congress on the results of this study 1 year after enactment.

SECTION 519: Study of Pretreatment of Toxics

Section 519 requires EPA to study issues associated with indirect discharges of toxics to POTWs and alternative regulatory strategies to protect POTWs. Issues related to contaminated sludge are to be addressed for each identified alternative regulatory strategy considered for protecting POTWs. The Administrator shall submit a report on the results of such study to the Congress within 4 years.

SECTION 520: Studies of Water Pollution Problems in Aquifers

Section 520 requires EPA to study ground water quality problems of 7 named aquifers or areas of underground water supply, including specifically named counties in Connecticut. The amendment authorizes \$7 million to conduct the studies. The Agency is required to report to Congress within 2 years of enactment the results of this study.

SECTION 521: Great Lakes Consumptive Use Study.

Section 512 authorizes \$750,000 for the Corps of Engineers, in cooperation with the Administrator, other Federal agencies, and the States, to study Great Lakes water consumption, its economic and environmental impacts, and control measures. The study is to review forecasting methodologies, to assess the impacts of thermal discharge regulation and manufacturing water use, and to develop recommendations to control consumption.

SECTION 522: Sulfide Corrosion Study.

Section 522 authorizes EPA to conduct a study on the effect of sulfides in collection and treatment systems, the extent to which the uniform imposition of categorical pretreatment standards will exacerbate this problem, and the range of available options to deal with the effects. The study is to be conducted in consultation with the Los Angeles City, and County sanitation agencies. A report to Congress is due 1 year after enactment and \$1 million is authorized for the study.

SECTION 523: Study of Rainfall Induced Infiltration into Sewer Systems.

Section 523 requires EPA to study problems associated with rainfall induced infiltration into wastewater treatment sewer systems. As part of the study, the Administrator is required to study appropriate methods of regulating rainfall induced infiltration into the sewer system of the East Bay Municipal Utility District, CA. A report to Congress is due 1 year after enactment.

SECTION 524: Dam Water Quality Study.

Section 524 requires EPA, along with the States and other Federal agencies to study the effect of water impoundment by dams on the quality of navigable waters. The Administrator is required to submit a report to Congress on the results of the study by December 31, 1987.

SECTION 525: Study of Pollution in Lake Pond Oreille, Idaho.

Section 525 requires the Administrator to conduct a comprehensive water quality study of the Clark Fork River and its tributaries in the States of Idaho, Montana and Washington, for the purpose of identifying the sources of pollution. The Administrator is required to report to Congress his findings and recommendations concerning the results of this study.